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UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA

ROMULO RIMANDO,  
 Plaintiff,

v.

ALUM ROCK UNION ELEMENTARY  
 SCHOOL DISTRICT, MARIBEL GUIZAR-  
 MAITA, INDIVIDUALLY,  
 Defendants.

CASE NO. 5:08-cv-01874-JF

**NOTICE OF MOTION AND  
 MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT OF  
 DEFENDANTS' MOTION TO DISMISS**

**(Fed. R. Civ. P. 12)**

DATE: September 19, 2008  
 TIME: 9:00 a.m.  
 ROOM: 4, 5th Floor  
 TRIAL: None Set

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**TABLE OF CONTENTS**

1		
2	TABLE OF AUTHORITIES .....	ii
3	NOTICE OF MOTION .....	1
4	MEMORANDUM OF POINTS AND AUTHORITIES .....	2
5	I.    INTRODUCTION .....	2
6	II.   STATEMENT OF ISSUES .....	3
7	III.  STATEMENT OF RELEVANT FACTS .....	4
8	IV.   GOVERNING LAW UNDER RULE 12 .....	5
9	V.    ARGUMENT .....	6
10	A.   THIS COURT LACKS SUBJECT MATTER JURISDICTION	
11	OVER PLAINTIFF'S USERRA CLAIMS AND SHOULD THUS	
12	DISMISS SAME, AS WELL AS PLAINTIFF'S SUPPLEMENTAL	
13	STATE LAW CLAIMS. ....	6
14	1.    Claims Under USERRA Against State Employers Like the	
15	District Are Not Within the Jurisdiction of this Court. ....	7
16	2.    Upon Dismissal of Plaintiff's USERRA Claims for Lack of	
17	Subject Matter Jurisdiction, this Court Must Dismiss Plaintiff's	
18	Supplemental State Law Claims. ....	11
19	B.   ASSUMING <i>ARGUENDO</i> THAT THIS COURT HAS	
20	JURISDICTION OVER PLAINTIFF'S FEDERAL USERRA	
21	CLAIMS, THE ELEVENTH AMENDMENT BARS SUCH SUITS	
22	AGAINST THE DISTRICT. ....	12
23	C.   THE ELEVENTH AMENDMENT BARS PLAINTIFF'S STATE	
24	LAW CLAIMS AGAINST THE DISTRICT FOR DAMAGES AS	
25	WELL AS ALL OTHER MONETARY AND PROSPECTIVE	
26	RELIEF; AND THIS COURT SHOULD OTHERWISE DISMISS	
27	SUCH CLAIMS IN ITS DISCRETION UNDER 28 U.S.C. § 1367. ....	13
28	1.    The Eleventh Amendment Bars Plaintiff's State Law Claims	
	Against the District. ....	13
	2.    Even if Not Barred by the Eleventh Amendment, in its	
	Discretion, this Court Should Dismiss Plaintiff's	
	Supplemental State Law Claims. ....	14
	D.   REGARDLESS OF THIS COURT'S TREATMENT OF	
	PLAINTIFF'S USERRA CLAIMS, THE CALIFORNIA GTCA	
	BARS MOST, IF NOT ALL, OF PLAINTIFF'S SOUGHT	
	AFTER RELIEF UNDER THE CALIFORNIA MILITARY	
	AND VETERANS CODE. ....	15
	VI.   CONCLUSION .....	20

## TABLE OF AUTHORITIES

## Cases

## United States Supreme Court

<i>Bd. of Trs. v. Garrett</i> , 531 U.S. 356 (2001) .....	8-9
<i>Carnegie-Mellon Univ. v. Cohill</i> , 484 U.S. 343 (1998) .....	14
<i>Employees of Dept. of Pub. Health &amp; Welfare v. Dept. of Pub. Health &amp; Welfare</i> , 411 U.S. 279 (1973) .....	8
<i>Hafer v. Melo</i> , 502 U.S. 21 (1991) .....	12
<i>Kentucky v. Graham</i> , 472 U.S. 159 (1985) .....	12
<i>Mt. Healthy City Sch. Dist. v. Doyle</i> , 429 U.S. 274 (1977) .....	9, 12
<i>Pennhurst State Sch. &amp; Hosp. v. Halderman</i> , 465 U.S. 89 (1984) .....	13
<i>Seminole Tribe of Florida v. Florida</i> , 517 U.S. 44 (1996) .....	8
<i>United Mine Workers v. Gibbs</i> , 383 U.S. 715 (1966) .....	11
<i>Will v. Mich. Dept. of State Police</i> , 491 U.S. 58 (1989) .....	12

## Federal Appellate and District Courts

<i>Acri v. Varian Assoc., Inc.</i> , 114 F.3d 999 (9th Cir. 1997) .....	14
<i>Balistreri v. Pacifica Police Dept.</i> , 901 F.2d 696 (9th Cir.1990) .....	6
<i>Barron v. Reich</i> , 13 F.3d 1370 (9th Cir. 1994) .....	6
<i>Beentjes v. Placer County Air Pollution Control Dist.</i> , 254 F.Supp.2d 1159 (E.D. Cal. 2003) .....	8
<i>Belanger v. Madera</i> , 963 F.2d 248 (9th Cir. 1992) .....	9, 10, 12
<i>Brown v. Lucky Stores, Inc.</i> , 246 F.3d 1182 (9th Cir. 2001) .....	14
///	

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1	<i>BV Eng'g v. Univ. of Cal.,</i>	
2	858 F.2d 1394 (9th Cir. 1988) .....	10
3	<i>Clegg v. Cult Awareness Network,</i>	
4	18 F.3d 752 (9th Cir. 1994) .....	6
5	<i>Clemes v. Del Norte County Unified Sch. Dist.,</i>	
6	843 F.Supp. 583 (N.D. Cal. 1994) .....	9
7	<i>Cole v. Oroville Union High Sch. Dist.,</i>	
8	228 F.3d 1092 (9th Cir. 2000) .....	12
9	<i>Corrie v. Caterpillar, Inc.,</i>	
10	503 F.3d 974 (9th Cir. 2007) .....	5
11	<i>Davenport v. Bd. of Trs.,</i>	
12	2008 WL 17087 (E.D. Cal. Jan. 18, 2008) .....	20
13	<i>Fordyce v. City of Seattle,</i>	
14	55 F.3d 436 (9th Cir.1995) .....	13
15	<i>Forster v. SAIF Corp.,</i>	
16	23 F.Supp.2d 1196 (D. Or. 1998) .....	8, 12
17	<i>Freeman v. Oakland Unified Sch. Dist.,</i>	
18	179 F.3d 846 (9th Cir. 1999) .....	9, 12, 13, 14
19	<i>Gilligan v. Jamco Dev. Corp.,</i>	
20	108 F.3d 246 (9th Cir. 1997) .....	6
21	<i>Gilmore v. California, Dept. of Rehab.,</i>	
22	1995 WL 232364 (N.D. Cal. 1995) .....	13
23	<i>Herman Family Revocable Trust v. Teddy Bear,</i>	
24	254 F.3d 802 (9th Cir. 2001) .....	11
25	<i>Hilsenrath v. Shepard,</i>	
26	2007 WL 2729359 (N.D. Cal. Sept. 19, 2007) .....	5
27	<i>Hines v. Cal. Public Utilities Com'n,</i>	
28	2008 WL 2631361 (N.D. Cal. June 30, 2008) .....	20
	<i>Ileto v. Glock Inc.,</i>	
	349 F.3d 1191 (9th Cir. 2003) .....	6
	<i>Jackson v. Hayakawa,</i>	
	682 F.2d 1344 (9th Cir. 1982) .....	12
	<i>Jiang v. Lee's Happy House,</i>	
	2007 WL 3105087 (N.D. Cal. Oct. 23, 2007) .....	5
	<i>Knight v. Carlson,</i>	
	478 F.Supp. 55 (E.D. Cal. 1979) .....	8
	///	

1	<i>Larkins v. Dept. of Mental Health,</i>	
2	1999 WL 33100500 (M.D. Ala. Feb. 3, 1999) .....	10
3	<i>Lowery v. Reinhardt,</i>	
4	2008 WL 550083 (E.D. Cal. Feb. 27, 2008) .....	11
5	<i>Mingo v. Oakland Unified Sch. Dist.,</i>	
6	2002 WL 243755 (N.D. Cal. 2002) .....	13
7	<i>Mitchell v. Los Angeles Cmty. Coll. Dist.,</i>	
8	861 F.2d 198 (9th Cir. 1989) .....	12
9	<i>Musson Theatrical, Inc. v. Federal Express Corp.,</i>	
10	89 F.3d 1244 (6th Cir.1996) .....	11
11	<i>Or. Entm't Corp. v. City of Beaverton,</i>	
12	233 Fed.Appx. 618 (9th Cir. 2007) .....	14
13	<i>Palmater v. Mich. Dept. of State Police,</i>	
14	981 F.Supp. 529 (W.D. Mich. 1997) .....	8, 12
15	<i>Pareto v. F.D.I.C.,</i>	
16	139 F.3d 696 (9th Cir. 1998) .....	6
17	<i>Patel v. Penman,</i>	
18	103 F.3d 868 (9th Cir.1996) .....	15
19	<i>Porter v. Jones,</i>	
20	319 F.3d 483 (9th Cir. 2003) .....	12
21	<i>Risner v. Ohio Dept. of Rehab.,</i>	
22	___ F.Supp.2d ___, 2008 WL 2120543 (N.D. Ohio May 20, 2008) .....	8
23	<i>Rivera v. City of Merced,</i>	
24	2006 WL 3349576 (E.D. Cal. Nov. 16, 2006) .....	16
25	<i>Safe Air for Everyone v. Meyer,</i>	
26	373 F.3d 1035 (9th Cir. 2004) .....	5
27	<i>Sanchez v. Elk Grove Unified Sch. Dist.,</i>	
28	2007 WL 1515510 (E.D. Cal. May 22, 2007) .....	9, 12, 13
	<i>Santos v. Los Angeles County Dept. of Children &amp; Family Servs.,</i>	
	200 Fed.Appx. 681 (9th Cir. 2006) .....	14
	<i>Scott v. Pasadena Unified Sch. Dist.,</i>	
	306 F.3d 646 (9th Cir. 2002) .....	11
	<i>Spingola v. Regents of Univ. of Cal.,</i>	
	2000 WL 1780260 (N.D. Cal. 2000) .....	14-15
	<i>Stanley v. Trs. of Cal. State Univ.,</i>	
	433 F.3d 1129 (9th Cir. 2006) .....	13, 14
	///	

1	<i>Stoner v. Santa Clara County Office of Educ.,</i>	
2	502 F.3d 1116 (9th Cir. 2007) .....	9
3	<i>Tosco Corp. v. Communities for a Better Env't,</i>	
4	236 F.3d 495 (9th Cir.2001) .....	5
5	<i>Valadez v. Regents of Univ. of Cal.,</i>	
6	2005 WL 1541086 (E.D. Cal. June 29, 2005) .....	8, 9, 10
7	<i>Velasquez v. Frapwell,</i>	
8	165 F.3d 593 (7th Cir. 1999) .....	8, 10
9	<i>Velasquez v. Frampwell,</i>	
10	160 F.3d 389 (7th Cir. 1998) .....	8, 12
11	<i>Visa U.S.A., Inc. v. First Data Corp.,</i>	
12	2006 WL 516662 (N.D. Cal. Mar. 2, 2006) .....	11

### California State Courts

13	<i>Cal. Sch. Employees Ass'n v. Azusa,</i>	
14	152 Cal.App.3d 580 (1984) .....	17, 19
15	<i>Cal. Sch. Employees Ass'n v. Governing Bd.,</i>	
16	124 Cal.App.4th 574 (2004) .....	16, 18, 19
17	<i>City of Ontario v. Super. Ct.,</i>	
18	12 Cal.App.4th 894 (1993) .....	15, 17
19	<i>City of San Jose v. Super. Ct.,</i>	
20	12 Cal.3d 447 (1974) .....	16
21	<i>Fowler v. Howell,</i>	
22	42 Cal.App.4th 1746 (1996) .....	16
23	<i>Shirk v. Vista Unified Sch. Dist.,</i>	
24	42 Cal.4th 201 (2007) .....	15, 16
25	<i>Sofranek v. Merced County,</i>	
26	146 Cal.App.4th 1238 (2007) .....	16
27	<i>State v. Super. Ct. ("Bodde"),</i>	
28	32 Cal.4th 1234 (2004) .....	16
29	<i>Tapia v. County of San Bernardino,</i>	
30	29 Cal.App.4th 375 (1994) .....	17, 19
31	<i>TrafficSchoolOnline, Inc. v. Clarke,</i>	
32	112 Cal.App.4th 736 (2003) .....	19
33	<i>Williams v. Horvath,</i>	
34	16 Cal.3d 834 (1976) .....	16

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1 **Statutes, Rules, and Regulations**

2 **California Civil Code**

3 CAL. CIV. CODE §§ 51 *et seq.* ..... 13

4 **California Education Code**

5 CAL. EDUC. CODE § 88003 ..... 18

6 **California Government Code**

7 CAL. GOV'T CODE §§ 900 *et seq.* ..... 1

8 CAL. GOV'T CODE § 905 ..... 4, 5, 16, 17, 18, 19, 20

9 CAL. GOV'T CODE § 910 ..... 16

10 CAL. GOV'T CODE § 911.2 ..... 4, 5, 17, 18

11 CAL. GOV'T CODE § 935 ..... 4, 17, 19, 20

12 CAL. GOV'T CODE § 945.4 ..... 19

13 CAL. GOV'T CODE § 945.6 ..... 17

14 CAL. GOV'T CODE § 946 ..... 17

15 CAL. GOV'T CODE § 950.2 ..... 15-16, 19, 20

16 CAL. GOV'T CODE §§ 12900 *et seq.* ..... 13

17 **California Military and Veterans Code**

18 CAL. MIL. & VET. CODE § 394 ..... 4, 13, 14, 15, 20

19 CAL. MIL. & VET CODE § 395 ..... 4, 13, 14, 15, 20

20 **Federal Rules of Civil Procedure**

21 FED. R. CIV. P. 12 ..... 1, 2, 5, 6, 10, 11, 20

22 **Northern District Local Rules**

23 LOCAL RULE 7-2 ..... 1

24 LOCAL RULE 7-4 ..... 3

25 LOCAL RULE 11-3 ..... 5

26 **Public Laws**

27 Pub. L. 103-353, § 2(a), 108 Stats. 3149, 3165 (Oct. 13, 1994) ..... 7

28 ///

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**United States Code**

28 U.S.C. § 1331	4, 6
28 U.S.C. § 1367	3, 11, 13, 14
38 U.S.C. § 4312	4, 6
38 U.S.C. § 4313	4, 6
38 U.S.C. § 4316	4, 6
38 U.S.C. § 4322	9
38 U.S.C. § 4323	4, 6, 7, 8, 9, 10

**United States Constitution**

U.S. CONST. amend. XI	<i>passim</i>
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**Other**

Alum Rock Union Elementary School District Admin. Reg. 3320	1, 3, 4-5, 17, 19, 20
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1 **NOTICE OF MOTION**

2 TO PLAINTIFF ROMULO RIMANDO AND HIS ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that, pursuant to Northern District Local Rule 7-2, on September 19,  
4 2008, at 9:00 a.m., or as soon thereafter as the matter may be heard, in the above-entitled court located at  
5 280 South 1st Street, San Jose, California 95113, in Courtroom number 4, 5th floor, Defendants Alum  
6 Rock Union Elementary School District ("District") and District Chief Technology Officer Maribel  
7 Guizar-Maita ("Guizar-Maita") (referred to collectively with the District as "Defendants"), will and  
8 hereby do move to dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure ("Rule 12"), with  
9 respect to the entirety of Plaintiff Romulo R. Rimando's ("Plaintiff") Complaint on the following  
10 grounds:

11 1. Each and all of Plaintiff's purported claims under the Uniformed Services Employment and  
12 Reemployment Act of 1994 ("USERRA") are outside this Court's subject matter jurisdiction because  
13 Plaintiff's suit is one by an individual against a State employer, and, thus, are subject to the jurisdiction  
14 of California state courts only;

15 2. Absent subject matter jurisdiction over Plaintiff's federal USERRA claims, the Court must  
16 dismiss Plaintiff's supplemental state law claims;

17 3. Assuming *arguendo* that subject jurisdiction over Plaintiff's federal USERRA claims is  
18 proper in federal district court, such claims against the District are barred by the Eleventh Amendment of  
19 the United States Constitution, and the same applies to Plaintiff's state law claims;

20 4. Upon dismissal of Plaintiff's federal USERRA claims against the District on the basis of  
21 immunity under the Eleventh Amendment, the Court should, in its discretion, dismiss all of Plaintiff's  
22 remaining supplemental state law claims; and

23 5. Regardless, Plaintiff's state law claims for damages and other monetary relief, including  
24 backpay, salaries, and all other monetary sums under the California Military and Veterans Code are  
25 barred because Plaintiff fails to plead compliance, and did not comply, with the claim presentation  
26 requirements of the California Government Tort Claims Act (California Government Code §§ 900 *et*  
27 *seq.*) ("GTCA") and related District Administrative Regulation 3320.

28 ///

1 This Motion is based on the instant Notice, the Memorandum of Points and Authorities submitted  
 2 herewith, Defendants' Request for Judicial Notice in support of same, all pleading in this action, as well  
 3 as any and all arguments to be offered at the hearing upon this Motion.

4 Dated: July 18, 2008

Respectfully submitted,

LOZANO SMITH



SLOAN R. SIMMONS  
 Attorneys for Defendants  
 ALUM ROCK UESD and  
 MARIBEL GUIZAR-MAITA

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

On or about April 8, 2008, Plaintiff filed a complaint asserting claims under the federal USERRA and the California Military and Veterans Code against Defendants District and District employee Guizar-Maita in her *individual* capacity. (See Compl. at 1:14-15, ¶¶ 2, 15.) Under the Complaint, Plaintiff attempts to assert various claims seeking damages, including liquidated damages, back-pay, restored retirement benefits, reinstatement, pre- and post-judgment interest, attorneys fees, costs, and civil fines. (See Compl. at 5:9-22.)

This Motion identifies the issues to be decided, followed by a statement of facts and the governing standards and procedures under Rule 12 that relate to Defendants' Motion. Defendants' Motion then establishes their entitlement to dismissal of all or certain of Plaintiff's claims from the Complaint, including: (1) all claims against Defendants under USERRA for lack of subject matter jurisdiction; (2) Plaintiff's supplemental state law claims, as a result of the Court's lack of subject matter jurisdiction over Plaintiff's federal claims; (3) alternatively, all of Plaintiff's federal and state law claims against the District that seek any form of damages and other prospective relief on the basis of Eleventh Amendment immunity; (4) all state law claims against the Defendants, to the extent there the Court dismissed

1 Plaintiff's federal USERRA claims, regardless of the basis for doing so, as within the Court's discretion  
 2 under 28 U.S.C. § 1367; and (5) all of Plaintiff's state law claims for damages and various other forms  
 3 of monetary relief he seeks against Defendants, based on the failure to plead compliance or otherwise  
 4 comply with the GTCA and related District Administrative Regulation 3320.

5  
 6 **II.**  
**STATEMENT OF ISSUES TO BE DECIDED**

7 Pursuant to Local Rule 7-4, the following constitute the issues to be decided under Defendants'  
 8 Motion:

9 Whether this Court should dismiss Plaintiff's Complaint because:

10 1. Each and all of Plaintiff's purported claims under USERRA are outside this Court's subject  
 11 matter jurisdiction because Plaintiff's suit is one by an individual against a State employer, and, thus, are  
 12 subject to the jurisdiction of California state courts only;

13 2. Absent subject matter jurisdiction over Plaintiff's federal USERRA claims, the Court must  
 14 dismiss Plaintiff's supplemental state law claims;

15 3. Assuming *arguendo* that subject jurisdiction over Plaintiff's federal USERRA claims is  
 16 proper in federal district court, such claims against the District are barred by the Eleventh Amendment,  
 17 and the same applies to Plaintiff's state law claims;

18 4. Upon dismissal of Plaintiff's federal USERRA claims against the District on the basis of  
 19 immunity under the Eleventh Amendment, the Court should, in its discretion, dismiss all of Plaintiff's  
 20 remaining supplemental state law claims; and

21 5. Plaintiff's state law claims for damages and other monetary relief, including  
 22 backpay, salaries, and all other monetary sums under the California Military and Veterans Code are  
 23 barred because Plaintiff fails to plead compliance, and did not comply, with the claim presentation  
 24 requirements of the GTCA and related District Administrative Regulation 3320.

25 ///

26 ///

27 ///

28 ///

**III.  
STATEMENT OF RELEVANT FACTS**

On or about April 8, 2008, Plaintiffs filed, but did not serve, the Complaint. The Complaint includes claims for relief under 38 U.S.C. §§ 4312, 4313, and 4316(c) of USERRA, and California Military and Veterans Code §§ 394 and 395. (See Plaintiff's Complaint ("Compl.") at ¶ 20.) The Complaint names the District as a defendant, as well as Guizar-Maita in her *individual* capacity. (See Compl. at 1:14-15, ¶¶ 2, 15.) Plaintiff correctly alleges that the District is a California school district. (Compl. at ¶ 2.) The Complaint asserts jurisdiction exists in this Court for Plaintiff's USERRA claims under 38 U.S.C. § 4323(b)(3), or alternatively under 28 U.S.C. § 1331. (Compl. at ¶ 3.)

Plaintiff seeks "punitive and/or liquidated damages" under USERRA and the California Military and Veterans Code. (Compl. at ¶ 21.) Further, in the Complaint's prayer, Plaintiff generally requests against Defendants, "sums as the Court should deem reasonable and proper, including reinstatement to his former position with like seniority, status and pay together with back pay, liquidated damages, restored retirement benefits, reasonable attorneys' fees, pre-judgment interest, post-judgment interest if appropriate, expert witness fees and other litigation expenses, together with appropriate civil fines, damages . . . ." (Compl. at 5:11-15.)

Plaintiff alleges in the Complaint that after the District reemployed him on June 25, 2007, after leaving active duty with the United States Army, the District "terminated" his employment on August 9, 2007. (See Compl. at ¶¶ 11-13, 19.)

The District has adopted Administrative Regulation 3320, entitled "Business and Noninstructional Operations[;] Claims And Actions Against the District[.]" (See Defendants' Request for Judicial Notice in Supp. of Mot. to Dismiss ["RJN"], Ex. A.) District AR 3320 states, in pertinent part:

1. Claims for money or damages relating to a cause of action for death or for injury to person, personal property or growing crops shall be presented to the Governing Board not later than six months after the accrual of the cause of action. (Government Code 905, 911.2)
2. Claims for money or damages specifically excepted from Government Code 905 shall be filed not later than six months after the accrual of the cause of action. (Government Code 905, 911.2, 935)

///

3. Claims for money or damages as authorized in Government Code 905 and not included in item #1 above, including claims for damages to real property, shall be filed not later than one year after the accrual of the cause of action. (Government Code 905, 911.2)

(RJN, Ex. A at p. 3.) No where in the Complaint does Plaintiff plead compliance, or excuse from compliance, with the GTCA or AR 3320; nor can he. (*See* Compl. at 1-5.)<sup>1</sup>

#### IV. GOVERNING LAW UNDER RULE 12

A motion seeking dismissal under Rule 12(b)(1) "attacks 'the substance of the complaint's jurisdictional allegations[.]'" (*Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007) (citation omitted).)

When subject matter jurisdiction is challenged under . . . Rule . . . 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion. A plaintiff suing in a federal court must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case, unless the defect be corrected by amendment.

(*Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495, 499 (9th Cir.2001) (citations and internal quotations omitted); *see also Jiang v. Lee's Happy House*, 2007 WL 3105087, at p. \*1 (N.D. Cal. Oct. 23, 2007) (slip op.) ("As plaintiff is the party seeking to invoke the court's jurisdiction, he bears the burden of establishing subject matter jurisdiction.")) In a "facial [jurisdictional] attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." (*Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004)). The Court "must presume lack of jurisdiction until the plaintiff establishes otherwise." (*Hilsenrath v. Shepard*, 2007 WL 2729359, at p. \*2 (N.D. Cal. Sept. 19, 2007) (slip op.) (citation omitted).)

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<sup>1</sup> While the Complaint indicates that Plaintiff's counsel is a member of the Louisiana, not California, State Bar, and at the time of the filing of this Motion the docket for this case does not indicate any application for opposing counsel to appear *pro hac vice* in this matter, Defendants assume that Plaintiff's counsel intends to apply for same pursuant to Local Rule 11-3 and the Northern District's "Instructions for *Pro Hac Vice* Admission," as he has for at least one other pending matter before this Court.



1 A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in a complaint filed in  
 2 federal court. (*Ileto v. Glock Inc.*, 349 F.3d 1191, 1199 (9th Cir. 2003).) In other words, a motion to  
 3 dismiss under Rule 12(b)(6) requires a determination of whether the facts alleged in a complaint, if  
 4 proven, would or could support a claim for relief. (*Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir.  
 5 1998).) Dismissal of a claim or claims for relief pursuant to such a motion is proper where there is  
 6 either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable  
 7 legal theory." (*Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir.1990).) As such, the issue  
 8 on a motion to dismiss for failure to state a claim is not whether the claimant will ultimately prevail, but  
 9 whether the claimant is entitled to offer evidence to support the claims asserted. (*Gilligan v. Jamco Dev.*  
 10 *Corp.*, 108 F.3d 246, 249 (9th Cir. 1997).)

11 When evaluating a Rule 12(b)(6) motion, the Court must accept all material allegations in the  
 12 complaint as true and construe them in the light most favorable to the non-moving party. (*Barron v.*  
 13 *Reich*, 13 F.3d 1370, 1374 (9th Cir. 1994).) However, the Court is not required to accept "conclusory  
 14 legal allegations cast in the form of factual allegations if those conclusions cannot reasonably be drawn  
 15 from the facts alleged." (*Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).)

## V. ARGUMENT

### A. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S USERRA CLAIMS AND SHOULD THUS DISMISS SAME, AS WELL AS PLAINTIFF'S SUPPLEMENTAL STATE LAW CLAIMS.

21 As noted, Plaintiff's Complaint asserts claims under USERRA (38 U.S.C. §§ 4312, 4313,  
 22 4316(c)). (Compl. at ¶ 20.) Plaintiff asserts that this Court has jurisdiction over such claims pursuant to  
 23 38 U.S.C. § 4323(b)(3), or alternatively 28 U.S.C. § 1331. (Compl. at ¶ 3.) Plaintiff is incorrect, and  
 24 absent subject matter jurisdiction over Plaintiff's claims against the District, this Court must dismiss all  
 25 of Plaintiff's USERRA and state law claims.

26 ///

27 ///

28 ///

1       **1. Claims Under USERRA Against State Employers Like the District Are Not Within**  
 2       **the Jurisdiction of this Court.**

3       Prior to 1998, the jurisdictional provision for USERRA provided:

4       (b) In the case of an action against a State as an employer, the appropriate district court is  
 5       the court for any district in which the State exercises any authority or carries out any  
 6       function. In the case of a private employer the appropriate district court is the district court  
 7       for any district in which the private employer of the person maintains a place of business.

8       (c)(1)(A) The district courts of the United States shall have jurisdiction, upon the filing of a  
 9       complain . . . by or on behalf of the person claiming right or benefits under this chapter . . .

10       (Pub. L. 103-353, § 2(a), 108 Stats. 3149, 3165 (Oct. 13, 1994); *former* 38 U.S.C. § 4323(b), (c)(1)(A).)

11       Effective November 1998, Congress amended the jurisdiction for USERRA suits to the following:

12       (b)     **Jurisdiction.--**

13           (1)     In the case of an action against a State (as an employer) or a private employer  
 14           commenced by the United States, the district courts of the United States shall  
 15           have jurisdiction over the action.

16           (2)     *In the case of an action against a State (as an employer) by a person, the*  
 17           *action may be brought in a State court of competent jurisdiction in*  
 18           *accordance with the laws of the State.*

19           (3)     In the case of an action against a private employer by a person, the district  
 20           courts of the United States shall have jurisdiction of the action.

21       (38 U.S.C. § 4323(b)(1)-(3) (emphasis added).)

22       Per the express terms of USERRA, suits to enforce USERRA rights by the *United States* against a  
 23       State employer or suits by an *individual against a private employer* have jurisdiction in the United States  
 24       district courts. (*Id.* at § 4323(b)(1), (3).) However, to the contrary, suits *against a State employer by an*  
 25       *individual* "may be brought in a State court of competent jurisdiction in accordance with the laws of the  
 26       State." (*Id.* at § 4323(b)(2).) Under the plain language of USERRA, if the District is considered a "State  
 27       employer[.]" as opposed to a private employer, state courts, not this Court, have jurisdiction over  
 28       Plaintiff's USERRA claims.

29       Legal authority interpreting USERRA's jurisdictional provision establishes that the District is the  
 30       type of "State employer" which Congress intended be sued under USERRA in state court, not federal  
 31       court. Congress intended the relevant 1998 USERRA amendments to remedy the fact that State  
 32       employers were entitled to Eleventh Amendment immunity to USERRA claims in federal court. (*See*



1 *Risner v. Ohio Dept. of Rehab.*, \_\_\_ F.Supp.2d \_\_\_, 2008 WL 2120543, at pp. \*4-6 (N.D. Ohio May 20,  
 2 2008) (discussing legislative history of 1998 USERRA jurisdiction amendments); *see also Velasquez v.*  
 3 *Frapwell*, 165 F.3d 593, 593-94 (7th Cir. 1999) ("*Velasquez II*").) This issue became most pressing after  
 4 the United States Supreme Court's ruling in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996),  
 5 after which federal courts more routinely protected States immunity under the Eleventh Amendment  
 6 when sued in federal court, including in cases involving USERRA establishing that Congress did not  
 7 validly abrogate States' Eleventh Amendment immunity through USERRA. (*See Velasquez v.*  
 8 *Frapwell* ("*Valesquez I*"), 160 F.3d 389, 391-95 (7th Cir. 1998), *rev'd on other grounds in Velasquez*  
 9 *II*, 165 F.3d at 593-94; *Forster v. SAIF Corp.*, 23 F.Supp.2d 1196, 1197-98 (D. Or. 1998); *Palmater v.*  
 10 *Mich. Dept. of State Police*, 981 F.Supp. 529, 531-32 (W.D. Mich. 1997).) Thus, the 1998 USERRA  
 11 amendment setting jurisdiction for USERRA suits by individuals against State employers in state court,  
 12 as opposed to federal court, fixed the problem individual plaintiffs faced with State employers' Eleventh  
 13 Amendment affirmative defense in federal court. (*See Valadez v. Regents of Univ. of Cal.*, 2005 WL  
 14 1541086, at pp. \*2-4 (E.D. Cal. June 29, 2005); *see also Risner*, 2008 WL 2120543, at pp. \*4-6.)

15 This understanding of USERRA makes consummate sense in that if the United States sues a State  
 16 employer on behalf of an individual to enforce the individuals USERRA rights, jurisdiction for the suit  
 17 lies in federal court. (*See* 38 U.S.C. § 4323(b)(1).) The Eleventh Amendment does not bar suits by the  
 18 United States against State defendants in federal court. (*E.g., Employees of Dept. of Pub. Health &*  
 19 *Welfare v. Dept. of Pub. Health & Welfare*, 411 U.S. 279, 285-86 (1973).) Similarly, individuals may  
 20 sue "private employers" in federal court for alleged USERRA violations—where the Eleventh  
 21 Amendment affirmative defense is irrelevant. (*See* U.S. CONST. amend. XI; 38 U.S.C. § 4323(b)(3).)  
 22 Finally, while USERRA defines "private employers" to include "a political subdivision of a State" (also  
 23 a 1998 USERRA amendment addition), in context of the 1998 amendments this can only mean political  
 24 subdivisions of the State not considered the State for purposes of Eleventh Amendment immunity, such  
 25 as cities, counties, etc. (*See, e.g., Beentjes v. Placer County Air Pollution Control Dist.*, 254 F.Supp.2d  
 26 1159, 1163-73 (E.D. Cal. 2003) (California county air pollution control district not arm of state); *Knight*  
 27 *v. Carlson*, 478 F.Supp. 55, 56-58 (E.D. Cal. 1979) (California counties not arms of the state); *cf. Bd. of*  
 28 *///*

1 *Trs. v. Garrett*, 531 U.S. 356, 369 (2001) ("the Eleventh Amendment does not extend its immunity to  
2 units of local government").)

3 It is *black letter law* that California school districts are considered arms of the state for purposes of  
4 the Eleventh Amendment and, thus, are entitled to Eleventh Amendment immunity. (See *Stoner v. Santa*  
5 *Clara County Office of Educ.*, 502 F.3d 1116, 1122 (9th Cir. 2007); *Freeman v. Oakland Unified Sch.*  
6 *Dist.*, 179 F.3d 846, 846-47 (9th Cir. 1999); *Belanger v. Madera*, 963 F.2d 248, 250-255 (9th Cir. 1992);  
7 *Sanchez v. Elk Grove Unified Sch. Dist.*, 2007 WL 1515510, at p. \*5 (E.D. Cal. May 22, 2007) (slip op.);  
8 *Clemes v. Del Norte County Unified Sch. Dist.*, 843 F.Supp. 583, 593 (N.D. Cal. 1994).) As a result, for  
9 purposes of USERRA and consistent with the 1998 USERRA amendments, the District is a "State  
10 employer" and this Court lacks subject matter jurisdiction over Plaintiff's USERRA claims.<sup>2</sup> (Cf.  
11 *Stoner*, 502 F.3d at 1122 (discussing similar analytical step in interpreting other federal statute).)  
12 Though *in other states* political subdivisions constituting private employers under USERRA may  
13 include school districts, that is simply not the case in California based on *Belanger* and its progeny.  
14 (See, e.g., *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 280 (1977) (finding that under Ohio law,  
15 school district more like county or city than arm of the state).)

16 Based on the language in USERRA's jurisdictional provision and the authority cited above, it is  
17 not surprising that Defendants cannot identify one post-1998 judicial decision involving an individual  
18 suing a California school district in federal court directly under USERRA. However, *Valadez v. The*  
19 *Regents of the Univ. of Cal.*, 2005 WL 1541086 (E.D. Cal. June 29, 2005), is the most analogous case to  
20 that at bar, and exemplifies the proper outcome here. In *Valadez*, an individual defendant brought suit  
21 against the Regents of the University of California alleging USERRA violations. (*Valadez*, 2005 WL  
22 1541086, at p. \*1.) The defendants sought to dismiss plaintiff's USERRA claims on the basis that the  
23 California district court lacked subject matter jurisdiction over the plaintiff's claims because of the 1998  
24 USERRA jurisdictional amendments or, alternatively, the plaintiff's USERRA claims were barred by the  
25 Eleventh Amendment. (*Id.* at p. \*3.) The *Valadez* court noted first that, under the same reasoning and  
26

27 <sup>2</sup> Because USERRA claims are only viable against "employers" (see 38 U.S.C. §§ 4322-23)),  
28 Defendants assume that Plaintiff raises such claims only against the District. Plaintiff's Complaint does  
not indicate otherwise.

1 analysis that *Belanger* and its progeny hold that California school districts are arms of the state, "there is  
 2 no dispute that" the defendant Board of Trustees of Regents of the University of California is an arms of  
 3 the state and, thus a state employer under USERRA. (*Id.* (citations omitted); *compare BV Eng'g v. Univ.*  
 4 *of Cal.*, 858 F.2d 1394, 1395 (9th Cir. 1988) (cited in *Valadez* regarding University of California's status  
 5 as arm of state) *with Belanger*, 963 F.2d at 250-255.) On point, the *Valadez* court reasoned and held in  
 6 pertinent part:

7  
 8 an examination of the text of 38 U.S.C. § 4323 and the changes Congress made to  
 9 that text in 1998 persuades this court that the authorities cited reach the correct conclusion . .  
 10 . . [F]ederal district courts had jurisdiction over all USERRA claims against state employers  
 11 regardless of the plaintiff's status. *See also* 38 U.S.C. § 4323, legislative notes (38 U.S.C. §  
 12 4323(b) used to allow "an action against a State as an employer" to be brought in "any  
 13 district in which the State exercise[d] any authority or carrie[d] out any function."). This  
 14 changed with the 1998 amendment.

15 In that amendment, Congress clearly made the proper forum for USERRA claims  
 16 dependent on who sued whom. The amended statute specifically grants federal district  
 17 courts jurisdiction over USERRA claims brought by the United States against both state and  
 18 private employers and claims brought by persons against private employers. [Footnote  
 19 omitted.] However, "[i]n the case of an action against a State (as an employer) by a person,  
 20 ..." the postamendment statute states only that "... the action may be brought in a State court  
 21 of competent jurisdiction in accordance with the laws of the State." 38 U.S.C. §  
 22 4323(b)(2)(emphasis added).

23 One might argue that the permissive language used in § 4323(b)(2) was not meant to  
 24 exclude a person from bringing a USERRA claim against a state employer in federal court.  
 25 However, this argument is effectively defeated by the fact that, in the course of amending the  
 26 statute, Congress removed the language from the preamendment statute allowing all actions  
 27 against state employers to be brought in qualifying district courts. *See* 38 U.S.C. § 4323,  
 28 legislative notes (listing previous text of 38 U.S.C. § 4323(b)) . . . . Therefore, the court  
 interprets § 4323(b)(2) in accordance with the other courts that have reached the issue and  
 concludes that federal district courts lack original jurisdiction over USERRA claims brought  
 by persons against a state employer.

(*Id.* at pp. \*3-4.) *Valadez* is consistent with other post-1998 decisions regarding USERRA suits by  
 individuals against state employers that would otherwise be entitled to Eleventh Amendment immunity,  
 all holding that federal district courts lack subject matter jurisdiction over such claims. (*See Velasquez*  
*v. Frapwell*, 165 F.3d 593, 593-94 (7th Cir. 1999); *Larkins v. Dept. of Mental Health*, 1999 WL  
 33100500, at pp. \*1-2 (M.D. Ala. Feb. 3, 1999).)

Based on all of the above, this Court should dismiss Plaintiff's USERRA claims for lack of subject  
 matter jurisdiction under Rule 12(b)(1).

///

**2. Upon Dismissal of Plaintiff's USERRA Claims for Lack of Subject Matter Jurisdiction, this Court Must Dismiss Plaintiff's Supplemental State Law Claims.**

28 U.S.C. § 1367, the federal statute delineating federal courts' supplemental jurisdiction over state law claims, states in pertinent part:

Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts *have original jurisdiction*, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(28 U.S.C. § 1367(a) (emphasis added).) As such, under 28 U.S.C. § 1367(a), "[i]f the district court dismisses all federal claims on the merits, it has discretion under § 1367(c) to adjudicate the remaining claims; *if the court dismisses for lack of subject matter jurisdiction, it has no discretion and must dismiss all claims.*" (*Herman Family Revocable Trust v. Teddy Bear*, 254 F.3d 802, 806 (9th Cir. 2001); *see also Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 664 (9th Cir. 2002).) In other words, following dismissal of Plaintiff's federal USERRA claims for lack of subject matter jurisdiction under Rule 12(b)(1), "[e]xercise of jurisdiction [over Plaintiff's supplemental state law claims] . . . would[ ] violate Article III of the Constitution, because the original federal claim would not have 'substance sufficient to confer subject matter jurisdiction upon the court[.]'" (*Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1255 (6th Cir.1996) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)).)

As a consequence of this Court's dismissal of Plaintiff's USERRA claims under Rule 12(b)(1) for lack of subject matter jurisdiction, pursuant to strictures of 28 U.S.C. § 1367, this Court cannot exercise supplemental jurisdiction over Plaintiff's state law claims, and the Court must dismiss them as well. (*See Lowery v. Reinhardt*, 2008 WL 550083, at p. \*7 (E.D. Cal. Feb. 27, 2008) (slip op.) ("Where the district court dismisses all federal claims for lack of subject matter jurisdiction on the merits, it has no discretion to retain supplemental jurisdiction to adjudicate the remaining state law claims.") (citation omitted); *Visa U.S.A., Inc. v. First Data Corp.*, 2006 WL 516662, at p. \*7 (N.D. Cal. Mar. 2, 2006) (same).)

///



**B. ASSUMING ARGUENDO THAT THIS COURT HAS JURISDICTION OVER PLAINTIFF'S FEDERAL USERRA CLAIMS, THE ELEVENTH AMENDMENT BARS SUCH SUITS AGAINST THE DISTRICT.**

If the Court does not dismiss Plaintiff's USERRA's claims for lack of subject matter jurisdiction, such claims are barred by the Eleventh Amendment.

Generally, "[t]he Eleventh Amendment erects a . . . bar against federal lawsuits brought against a state." *Porter v. Jones*, 319 F.3d 483, 491 (9th Cir. 2003) (citation omitted).<sup>3</sup> Whether Eleventh Amendment immunity applies to protect the particular governmental agency in question from such suit depends on whether the entity is an arm of the State. (*Mt. Healthy City Sch. Dist.*, 429 U.S. at 280; *Mitchell v. Los Angeles Cmty. Coll. Dist.*, 861 F.2d 198, 201-02 (9th Cir. 1989). As noted, it is settled law that California school districts (such as the District) are arms of the State and, thus, enjoy Eleventh Amendment immunity. (*E.g.*, *Freeman*, 179 F.3d at 846-47; *Belanger*, 963 F.2d at 250-255; *Sanchez*, 2007 WL 1515510, at p. \*5.)

While Congress may abrogate the States' Eleventh Amendment immunity, it has not done so through USERRA. (*See Valesquez I*, 160 F.3d at 391-95; *Forster*, 23 F.Supp.2d at 1197-98; *Palmater*, 981 F.Supp. at 531-32; see also *Risner*, 2008 WL 2120542 at pp. \*6-9).<sup>4</sup> Thus, any claims by Plaintiff under USERRA are barred, regardless of the issue of subject matter jurisdiction for such claims. (*See Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1100 n.4 (9th Cir. 2000) (citing *Belanger*, 963 F.2d at 251-54 and *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 (1989)).)

///

<sup>3</sup> This bar extends to suits against state officers in their official capacities based on the reasoning that "official capacity suits 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" (*Hafer v. Melo*, 502 U.S. 21, 25 (1991) (citing *Kentucky v. Graham*, 472 U.S. 159, 165 (1985)); *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982) (citation omitted).) That said, Plaintiff's Complaint does not include any claims against any District officials in their official capacity.

<sup>4</sup> Notably, the cited decisions were issued prior to the 1998 amendment to USERRA by Congress that sought to fix the issue of States' Eleventh Amendment immunity to suit under USERRA by providing for exclusive jurisdiction for such claims by individuals against State employers in state courts. Presumably Congress succeeded with its intent for the amendments, and claims like those raised by Plaintiff are now raised in state court, as opposed to federal court where the Eleventh Amendment affirmative defense is available.

**C. THE ELEVENTH AMENDMENT BARS PLAINTIFF'S STATE LAW CLAIMS AGAINST THE DISTRICT FOR DAMAGES AS WELL AS ALL OTHER MONETARY AND PROSPECTIVE RELIEF; AND THIS COURT SHOULD OTHERWISE DISMISS SUCH CLAIMS IN ITS DISCRETION UNDER 28 U.S.C. § 1367.**

**1. The Eleventh Amendment Bars Plaintiff's State Law Claims Against the District.**

The Eleventh Amendment affirmative defense for the District extends not only to Plaintiff's USERRA claims, but his state law claims as well: "The Eleventh Amendment bars federal suits against a state, its agencies, or its departments *for violations of state law* regardless of the relief sought, unless the state consents to suit." (*Sanchez*, 2007 WL 1515510, at p. \*4 (citations omitted) (emphasis added); *see Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 121 (1984) (federal courts cannot award monetary damages or prospective relief against State for state law violations).)

Federal courts in California have repeatedly applied the above-referenced principle of the Eleventh Amendment to bar state law claims against arms of the State such as the District. For example, in *Freeman v. Oakland Unified School District*, 179 F.3d 846 (9th Cir. 1999), the Ninth Circuit Court of Appeals upheld the district court's dismissal of the plaintiff's state law claims under the California Fair Employment and Housing Act ("FEHA") (California Government Code §§ 12900 *et seq.*) on this basis. (*Freeman*, 179 F.3d at 846-47 ("28 U.S.C. § 1367 is not a congressional abrogation of state sovereign immunity. *See Pennhurst* . . . (holding the Eleventh Amendment 'applies . . . to state law claims brought into federal court under pendent jurisdiction'). California has not waived its immunity to FEHA actions in federal court. *See Fordyce v. City of Seattle*, 55 F.3d 436, 441 (9th Cir.1995) ('[A] statute consenting to suit in state court does not constitute consent to suit in federal court.')."); *Mingo v. Oakland Unified Sch. Dist.*, 2002 WL 243755, at p. \*2 (N.D. Cal. 2002) (same); *see also Gilmore v. California, Dept. of Rehab.*, 1995 WL 232364, at p. \*4 (N.D. Cal. 1995) ("In addition, the Eleventh Amendment bars all of Gilmore's state law claims against the department and its director in his or her official capacity.") (citation omitted).) In *Stanley v. Trustees of California State University*, 433 F.3d 1129, 1133-34 (9th Cir. 2006), the Ninth Circuit reached the same conclusion as in *Freeman* with regard to state law claims under the California Unruh Civil Rights Act ("Unruh Act") (Civil Code §§ 51 *et seq.*).

Here, there is no difference between Plaintiff's claims for damages, as well as all other monetary and prospective relief under California Military and Veterans Code §§ 394 and 395 (*see Compl. at ¶¶*

20-21, 5:11-15) and the FEHA and Unruh Act state law claims in *Freeman* and *Stanley*. Regardless of whether this Court dismisses Plaintiff's USERRA claims for lack of subject matter jurisdiction or based on Eleventh Amendment immunity, this Court should dismiss Plaintiff's Military and Veterans Code § 394 claim because Plaintiff seeks actual damages under same, and Plaintiff's Military and Veterans Code § 395 to the full extent that Plaintiff's seeks damages, as well as all other monetary and prospective relief against the District under same, based on Eleventh Amendment immunity. (*See* Compl. at ¶¶ 20-21, 5:11-15; CAL. MIL. & VET. CODE § 394 (g); *see also Stanley*, 433 F.3d at 1133-34; *Freeman*, 179 F.3d at 846-47.)

**2. Even if Not Barred by the Eleventh Amendment, in its Discretion, this Court Should Dismiss Plaintiff's Supplemental State Law Claims.**

Assuming *arguendo* that: (1) Plaintiff's federal USERRA claims are not dismissed for lack of subject matter jurisdiction and, thus, do not trigger automatic dismissal of Plaintiff's supplemental state law claims; and (2) Plaintiff's state law claims are not barred by the Eleventh Amendment; but (3) Plaintiff's USERRA claims *are* barred by the Eleventh Amendment, this Court should dismiss Plaintiff's state law claims in its discretion under 28 U.S.C. § 1367.

"[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims." (*Acri v. Varian Assoc., Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n. 7 (1998)).) In fact, the general rule is that it is not an abuse of discretion for the district court to decline to exercise supplemental jurisdiction over pendant state-law claims once all federal claims are resolved. (*Or. Entm't Corp. v. City of Beaverton*, 233 Fed.Appx. 618, 619 (9th Cir. 2007) ("Because the district court correctly resolved all the federal claims, it did not abuse its discretion in declining to exercise supplemental jurisdiction.") (citation omitted); *Santos v. Los Angeles County Dept. of Children & Family Servs.*, 200 Fed.Appx. 681, 683 (9th Cir. 2006) ("While the parties argue the merits of Santos's state law claims, the district court's dismissal was based on its determination to decline to exercise supplemental jurisdiction."); *see also* 28 U.S.C. § 1367(c); *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1189 (9th Cir. 2001); *Spingola v. Regents of Univ. of Cal.*, 2000 WL 1780260, at p. \*11 (N.D. Cal. 2000) ("It is not an abuse of discretion to remand remaining state-law claims when



1 federal-law claims have been resolved.”) (citing *Patel v. Penman*, 103 F.3d 868, 878 (9th Cir.1996)).)

2 As such, assuming dismissal of Plaintiff’s USERRA claims one way or another as described above, this

3 Court should exercise its discretion and dismiss Plaintiff’s state law claims as well.

4

5 **D. REGARDLESS OF THIS COURT’S TREATMENT OF PLAINTIFF’S USERRA CLAIMS,**

6 **THE CALIFORNIA GTCA BARS MOST, IF NOT ALL, OF PLAINTIFF’S SOUGHT**

7 **AFTER RELIEF UNDER THE CALIFORNIA MILITARY AND VETERANS CODE.**

8 Plaintiff raises state law claims under California Military and Veterans Code §§ 394 ad 395.

9 Section 394 is in essence an anti-discrimination statute aimed at protecting members of the armed forces

10 from discrimination based on their membership or service in the military forces. The remedies under §

11 394 are as follows: "Any person violating this section is guilty of a misdemeanor. In addition, any

12 person violating any of the provisions of this section shall be liable for *actual damages* and reasonable

13 attorney’s fees incurred by the injured party." (CAL. MIL. & VET. CODE § 395(g).) Section 395 of the

14 Military and Veterans Code provides for temporary leaves of absence by public employees for military

15 service and provides, under certain conditions, a right to reinstatement to am employee who takes such

16 leave.

17 While § 394 provides the remedy of actual damages for discrimination based on military status,

18 and § 395 provides for reinstatement after a temporary military leave of absence, Plaintiff seeks the

19 following remedies under his state law claims: "sums as the Court should deem reasonable and proper,

20 including reinstatement to his former position with like seniority, status and pay together with back pay,

21 liquidated damages, restored retirement benefits, reasonable attorneys’ fees, pre-judgment interest, post-

22 judgment interest f appropriate, expert witness fees and other litigation expenses, together with

23 appropriate civil fines, damages . . . ." (*See* Compl. at 5:11-15; *see also* Compl. at 5:15-22.)

24 As the general rule, the GTCA requires that “any party with a claim for money or damages against

25 a public entity must first file a claim directly with that entity; only if that claim is denied or rejected may

26 the claimant file a lawsuit.” (*City of Ontario v. Super. Ct.*, 12 Cal.App.4th 894, 898 (1993) (citations

27 omitted); *see also Shirk v. Vista Unified Sch. Dist.*, 42 Cal.4th 201, 208 (2007) (citations omitted).) The

28 claim presentation requirement also applies to “a cause of action against a public employee . . . for injury

resulting from an act or omission in the scope of his employment as a public employee . . . .” (CAL.

1 GOV'T CODE § 950.2; *see Rivera v. City of Merced*, 2006 WL 3349576, at p. \*6 (E.D. Cal. Nov. 16,  
2 2006); *Williams v. Horvath*, 16 Cal.3d 834, 838 (1976).<sup>5</sup>

3 A “[t]imely claim presentation is not merely a procedural requirement, but is . . . a condition  
4 precedent to plaintiff’s maintaining an action against defendant . . . , and thus *an element of the*  
5 *plaintiff’s cause of action.*” (*Shirk*, 42 Cal.4th at 209 (citing *State v. Super. Ct.*, 32 Cal.4th 1234, 1240  
6 (2004) (“*Bodde*”) (quotations omitted and emphasis added); *see also City of San Jose v. Super. Ct.*, 12  
7 Cal.3d 447, 454 (1974) (“In actions for damages against local public entities, the claims statutes require  
8 timely filing of a proper claim as condition precedent to the maintenance of the action . . . Compliance  
9 with the claims statutes is mandatory . . . ; and failure to file a claim is fatal to the cause of action.”)  
10 (citations omitted).) “Complaints that do not allege facts demonstrating either that a claim was timely  
11 presented or that compliance with the claims statute is excused are subject to a general demurrer for not  
12 stating facts sufficient to constitute a cause of action.” (*Id.* (citing *Bodde*, 32 Cal.4th at 1245); *see also*  
13 *Sofranek v. Merced County*, 146 Cal.App.4th 1238, 1246 (2007) (“Failure to timely present a claim for  
14 money or damages to a public entity bars a plaintiff from filing a lawsuit against that entity . . . Before a  
15 cause of action may be stated, a plaintiff must allege either compliance with this procedure or  
16 circumstances excusing compliance.”) (citations omitted).)

17 Government Code § 905 encompasses the general rule for claim presentation, but also includes the  
18 relevant exceptions. (*See Cal. Sch. Employees Ass’n v. Governing Bd.*, 124 Cal.App.4th 574, 589  
19 (2004).) Specifically, Government Code § 905 states, in pertinent part:

20 There shall be presented in accordance with Chapter 1 (commencing with Section 900) and  
21 Chapter 2 (commencing with Section 910) of this part all claims for money or damages  
22 against local public entities except:

23 \*\*\*

24 (c) Claims by public employees for fees, salaries, wages, mileage or other expenses and  
25 allowances.

---

26 <sup>5</sup> For purposes of California Government Code § 950.2, “[a]n employee acts within ‘the scope  
27 of his employment’ when he is engaged in work he was employed to perform or when an act is incident  
28 to his duty and was performed for the benefit of his employer and not to serve his own purpose.”  
(*Fowler v. Howell*, 42 Cal.App.4th 1746, 1750 (1996) (citation omitted).)

1 \*\*\*

2 (f) Applications or claims for money or benefits under any public retirement or pension  
3 system.

3 \*\*\*

4 (CAL. GOVT. CODE § 905(c), (f); *see City of Ontario*, 12 Cal.App.4th at 898.)

5 While Government Code § 905 excepts certain claims from the GTCA's claim presentation  
6 requirements, Government Code § 935 "empowers local public entities to establish their own policies  
7 and procedures for the presentation of . . ." claims excepted by § 905. (*City of Ontario*, 12 Cal.App.4th  
8 at 898; *see* CAL. GOV'T CODE § 935.) Government Code § 935 provides, in pertinent part:

9 (a) Claims against a local public entity for money or damages which are excepted by  
10 Section 905 from Chapter 1 (commencing with Section 900) and Chapter 2  
11 (commencing with Section 910) of this part, and which are not governed by any other  
12 statutes or regulations expressly relating thereto, shall be governed by the procedure  
13 prescribed in any charter, ordinance or regulation adopted by the local public entity.

14 (b) The procedure so prescribed may include a requirement that a claim be presented and  
15 acted upon as a prerequisite to suit thereon. If such requirement is included, any  
16 action brought against the public entity on the claim shall be subject to the provisions  
17 of Section 945.6 and Section 946.

18 (CAL. GOV'T CODE § 935(a)-(b); *see, e.g., Tapia v. County of San Bernardino*, 29 Cal.App.4th 375, 383  
19 (1994) (where local public entity adopted policy under § 935); *Cal. Sch. Employees Ass'n v. Azusa*, 152  
20 Cal.App.3d 580, 586 (1984) (same).)

21 Pursuant to Government Code § 935, District Administrative Regulation 3320 ("AR 3320"),  
22 regarding the "Time Limitations" for "Claims And Actions Against The District[.]" provides:

- 23 1. Claims for money or damages relating to a cause of action for death or for injury to  
24 person, personal property or growing crops shall be presented to the Governing  
25 Board not later than six months after the accrual of the cause of action. (Government  
26 Code 905, 911.2)
- 27 2. Claims for money or damages specifically excepted from Government Code 905  
28 shall be filed not later than six months after the accrual of the cause of action.  
(Government Code 905, 911.2, 935)
3. Claims for money or damages as authorized in Government Code 905 and not  
included in item #1 above, including claims for damages to real property, shall be  
filed not later than one year after the accrual of the cause of action. (Government  
Code 905, 911.2)

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1 *California School Employees Association v. Governing Board*, 124 Cal.App.4th 574 (2004)  
 2 (“CSEA”), exemplifies the effect of a claim presentation requirement adopted by a public entity pursuant  
 3 to California Government Code § 935 under the GTCA. In *CSEA*, the California School Employees  
 4 Association filed a petition for a writ of mandate seeking to compel the defendant community college  
 5 district to award three employees classified status and lost wages, alleging that the defendant district had  
 6 improperly interpreted Education Code § 88003, which governs when a substitute or short-term  
 7 community college district employee is entitled to classified service designation. (*CSEA*, 124  
 8 Cal.App.4th at 580-81.) The trial court rejected the petition. (*Id.* at 581.)

9 On appeal, the Court of Appeal reversed the trial court’s decision, reaching two distinct holdings.  
 10 (See *id.* at 593.) First, the appellate court ruled that the trial court erred in its interpretation of California  
 11 Education Code § 88003 (*id.* at 583-89), and ordered the trial court to issue a writ of mandate  
 12 reclassifying the relevant petitioner employees to classified employee status under California Education  
 13 Code § 88003 (*id.* at 593). Second, the appellate court held that the petitioners’ request for “lost wages”  
 14 resulting from the school district’s error in classification was barred by the petitioners’ failure to comply  
 15 with the GTCA. (*Id.* at 589-93.)

16 While both of the *CSEA* court’s holdings are important, the court’s second holding deserves the  
 17 most attention. In *CSEA*, just as here, the community college district adopted specific policies and  
 18 procedures under Government Code § 935 for the presentation of claims excepted by Government Code  
 19 § 905. (*Id.* at 589-90.) While the normal claim presentation requirements of the GTCA did not require  
 20 petitioners to present a claim for their requested lost wages damages (*see* CAL. GOV’T CODE § 905(c)),  
 21 Government Code § 935 and the defendant district’s local policy did require such presentation. (*Id.* at  
 22 590-93.) The *CSEA* court rejected the line of cases cited by petitioners that purportedly held that  
 23 “incidental damages,” e.g., money or damages sought incidental to injunctive or declaratory relief, did  
 24 not trigger the claim presentation requirements of the GTCA, whether or not such requirements are  
 25 based on procedures established by local public entities under Government Code § 935. (*Id.*)

26 Summarizing its holding regarding the petitioners’ sought-after damages that related to their  
 27 equitable relief of proper classification under Education Code § 88003, the *CSEA* court stated:

28 ///



As discussed, however, Government Code section 935 authorized local public entities to require notice for claims excepted under Government Code section 905. The statutory purpose underlying the notice provisions is furthered whether a claim for monetary relief is part of an equitable action or stands on its own. To carve out a judicial exception for incidental damages would frustrate the legislative intent underlying Government Code section 935. We therefore conclude CSEA was required to provide notice of its claims. Having failed to do so, the claims for lost wages and other monetary relief are barred.

(*Id.* at 592-93.) This holding in *CSEA* is consistent with other contemporary California decisions that have examined this issue. (*Tapia*, 29 Cal.App.4th at 383 (“Where a petition for writ of mandate may seek either monetary damages or other extraordinary relief, failure to file a claim is fatal to the recovery of money damages.”) (citations omitted); *Azusa*, 152 Cal.App.3d at 587 (“while CSEA was not required by Government Code section 900 *et seq.* to file the instant claim for wages as a prerequisite to petitioning the court for a peremptory writ of mandate, a claim was required to be lodged with appellant’s under the mandate of board policy 2602 [adopted pursuant to Government Code section 935]”); *see also TrafficSchoolOnline, Inc. v. Clarke*, 112 Cal.App.4th 736, 741 (2003) (“Since an incidental damage claim seeks monetary relief, the express language of Government Code section 945.4 requires presentation of a claim as a precondition to the filing of suit. The language of . . . section 945.4 contains no exception for ‘incidental damages’”) (citations omitted).)

All in all, California Government Code §§ 905, 935, 950.2, and AR 3320 requires timely filing/presentation of a claim to the District by a party asserting a claim for monetary damages, even where the claim is specifically excepted from Government Code § 905, such as “[c]laims by public employees for fees, salaries, wages, mileage or other expenses and allowances[]” and “[a]pplications or claims for money or benefits under any public retirement or pension system.” (CAL. GOV’T CODE § 905(c), (f).) The claim presentation requirement includes claims against Guizar-Maita for acts in the scope of her employment, such as those purported raised by Plaintiff in the Complaint. (CAL. GOV’T CODE § 950.2.)

Plaintiff does not plead in his Complaint compliance or an excuse from compliance with the claim presentation requirements of Government Code §§ 905, 935, and 950.2, or AR 3320, for claims for damages or other forms of monetary relief. (*See Compl.* at 1-5.) In fact, to the Defendants’ knowledge, Plaintiff did not file a claim with the District consistent with the GTCA or AR 3320 in relation to the damages and other monetary relief now sought in his Complaint against the District and Guizar-Maita.

Thus, all claims against the Defendants under California Military and Veterans Code § 394, which expressly provide only for the remedies of actual damages and reasonable attorneys' fees, are plainly barred by the GTCA. (*See* CAL. GOV'T CODE §§ 905, 935, 950.2; RJN, Ex. A at p. 3 (AR 3320).) Further, to the full extent that Plaintiff seeks any other form of monetary relief under California Military and Veterans Code § 395 against Defendants that is covered under the AR 3320, the GTCA and AR 3320 bar those claims too. (*See* CAL. GOV'T CODE §§ 905, 935, 950.2; RJN, Ex. A at p. 3 (AR 3320).) This Court should dismiss Plaintiff's state law claims consistent with the above-described authority under Rule 12(b)(6), for failure to state a claim on which relief may be granted. (*See, e.g., Hines v. Cal. Public Utilities Com'n*, 2008 WL 2631361, at p. \*10 (N.D. Cal. June 30, 2008) (slip op.); *Davenport v. Bd. of Trs.*, 2008 WL 17087, at pp. \*10-12 (E.D. Cal. Jan. 18, 2008) (slip op.).)

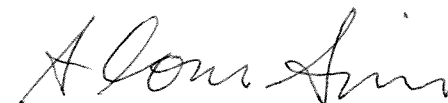
## VI. CONCLUSION

For the foregoing reasons, this Court should dismiss Plaintiff's Complaint in its entirety.

Dated: July 18, 2008

Respectfully submitted,

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